

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-7217

ORIGIN L

*To be argued by
D. DAVID COHEN*

In The
United States Court of Appeals
For The Second Circuit

COMMERCER TANKERS CORPORATION,
Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORP.,
Intervening Defendant-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORP.,
Plaintiff-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Defendant-Appellee.

PETITION FOR REHEARING

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In The
United States Court of Appeals
For The Second Circuit

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

-and-

VANTAGE STEAMSHIP CORP.,

Intervening Defendant-Appellant,

-against-

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORP.,

Plaintiff-Appellant,

-against-

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

PETITION FOR REHEARING

In accordance with Rule 40 of the Federal Rules of Appellate Procedure, Commerce Tankers Corporation (herein "Commerce" or "Petitioner"), respectfully petitions this Court for a rehearing of its decision of April 15, 1977.¹ Petitioner further suggests the appropriateness of rehearing *en banc*. Rule 35(b). *En banc* review appears appropriate by reason of the unsettled questions of exceptional importance to the interaction of the federal labor laws and antitrust laws conceded to be presented by the issues posed by this case (2943).

PRELIMINARY STATEMENT

In early 1971, an attempted sale by Commerce of its last remaining vessel to Vantage Steamship Corp. ("Vantage") was blocked by appellee, National Maritime Union ("NMU"), which obtained an arbitral award and preliminary injunction enforcing a restraint-on-transfer clause included in an unsigned printed industry-wide collective bargaining agreement. *National Maritime Union v. Commerce Tankers Corporation*, 325 F. Supp. 360 (S.D.N.Y. 1971). The injunction, conditioned only on the posting of a \$10,000 bond by the NMU, was later reversed. *McLeod v. Union*, 457 F.2d 1127 (2d Cir. 1972). And, the clause was held to be violative of §8(e) of the National Labor Relations Act, *NLRB v. Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

In the District Court, Commerce and Vantage each sought damages resulting from frustration of their business transaction. A two-week trial was held in January, 1975. On March 31, 1976, Hon. Thomas P. Griesa found that the appellant's damages were "caused by the injunction" — and limited recovery to \$10,000, the amount of the injunction bond. *National Maritime Union v. Commerce Tankers Corporation*, 411 F. Supp. 1225 (S.D.N.Y. 1976). An appeal to this Court was promptly pursued, and argued on January 19, 1977. A panel of this Court (opinion by Judge Feinberg) held in pertinent part that:

1. The NMU's restraint-on-transfer clause was not immunized from liability under the antitrust laws by the Union's lawsuit to enforce it or the fact that a preliminary injunction issued in such lawsuit² (2940-41); and

1. The slip opinion is included as an appendix to this Petition. References to the opinion herein are by page number in the slip opinion.

2. The District Court had erred in applying the wrong standard for proof of damages in antitrust cases in its finding that the "injunction" had been the proximate cause of appellant's damages (2941-42).

Nevertheless, Judge Feinberg's opinion left undisturbed the District Court's finding that the clause was not the result of a conspiracy between the NMU and the large shipping companies to enhance their competitive position; adding that "by the same token, the finding does not foreclose full examination of the appellants group boycott claim" which "appellants should be allowed to press" (2944, nn.9-10) before the District Court to which the case is remanded for further factual findings and an initial determination as to whether group boycotts in a labor context should be analyzed on a rule of reason approach rather than as *per se* violations.

Judge Lumbard dissented from this portion of the majority opinion, asserting that the record before the Court of Appeals required a finding of liability on either a *per se* or rule of reason analysis of the NMU's actions (2946-51).

In the view of petitioner, scrutiny of the full record, including the pleadings, prior findings against, and admissions by the Union, taken together, foreclose the need for further factual findings. In addition, petitioner asserts that the direction as to the "factual issues" to be determined on remand misconstrues the developing antitrust/labor law arising out of the Supreme Court decision in *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975).

Accordingly, petitioner seeks to have this Court substitute Judge Lumbard's views for the view of the majority of the panel. In the alternative, petitioner seeks to have this Court vacate, or clarify, its affirmance of the District Court's dismissal of Commerce's "second" antitrust claim.

ARGUMENT

I.

The NMU has failed to state any facts which would excuse the group boycott, whether judged on a *per se* or rule of reason analysis.

In the maritime industry a unique rule of labor relations, developed over many years and applicable to most employers, required each employer to use a crew of seamen represented by a single union on its entire fleet of vessels, including newly acquired vessels. *Moore McCormack Lines, Inc.*, 139 N.L.R.B. No. 70 (1962); *National Maritime Union (Overseas Carrier Corp.)*, 74 N.L.R.B. No. 36 (1969).

In 1968-70, a group of AFL-CIO affiliated maritime unions obtained the agreement³ of the bargaining agent for the principal employers' associations, the Maritime Service Committee ("MSC") and Tankers Service Committee ("TSC") that those employers would enforce the restraint-on-transfer agreements, which precluded sale of their United States flag vessels to competitors in the coastwise trade except to purchasers who would retain the same unions. As to the unlicensed seamen alone, the unquestioned object and effect of this clause was to make employers with fleetwide agreements with unions other than the NMU "ineligible" to buy NMU vessels. At the time, approximately half of the U.S. flag operators, including Vantage, had fleetwide agreements with the Seafarers International Union ("SIU") or units thereof.

As a consequence, Commerce, a willing seller, was prevented from transferring the business of operating the Vessel BARBARA in the coastwise trade to Vantage, a willing buyer, solely because Vantage was a member of a class with which the NMU and certain affiliated employers had agreed not to do business. Ordinarily, group boycotts are so pernicious a practice that upon proof of their existence, no explanation will be heard in defense of a challenge thereto under the antitrust laws. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

But, because the restraint arises in a labor context, the majority would remand for "detailed findings from the district court on the anti-competitive effects of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause" (2944). Petitioner believes that this direction gravely misapprehends the state of the developing law concerning *possible* non-statutory defenses to group boycotts in a labor context. If a "rule of reason" approach is to be employed, the competitive interests which are to be balanced must be those, on the one hand, favoring collective bargaining with those, on the other hand, favoring free competition in the business market. See *Connell, supra*, 421 U.S. at 622.

In no event may a restriction on competition in the business market as unreasonable as a multi-employer group boycott be excused by a mere showing that the labor party to the agreement did not have an anti-competitive purpose. Indeed, petitioner suggests that the labor party's "purposes" with respect to the business market are, absent allegations of conspiracy, always irrelevant to the inquiry. It is not the union's goals, but its methods that determine antitrust liability. *Connell*, 421 U.S. at 625.

In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (January 25, 1977), cited by both Judge Feinberg and Judge Lumbard, the proper accommodation is said to be:

"First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.... Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining." 543 F.2d at 614 (citations omitted).

Application of the *Mackey* formula to the instant case forecloses the need for further factual findings.

Primary Effect

This Court has already found that "The clause was also 'addressed' to the labor relations of the secondary employer, since it required Vantage to be or to become an NMU employer, to the extent of manning the BARBARA." 486 F.2d at 912. And further "despite the NMU's claims that it is merely attempting to avoid erosion of its place in a dying industry, the broader impact of its 'work preservation' clause is to advance its own organization goals at the expense of the SIU." 486 F.2d at 913.

Indeed, restraint-on-transfer had *no* impact whatever in respect of the operations of vessels by, or as concerns transfers

between, NMU owners. The targets of the clause were Vantage and other non-NMU contracted potential buyers of vessels (2942).

Mandatory Subject of Bargaining

The restraint-on-transfer clause was not a proper subject of collective bargaining. It did not pertain to the wages, hours and other terms and conditions of employment. The Supreme Court has held that the decision to terminate one's business is peculiarly a matter of management prerogative. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). Successorship is a legal issue relating to unit determination. *NLRB v. Burns International Security Systems Inc.*, 406 U.S. 272 (1972). Burns also stressed that requiring a new employer to abide by the substantive terms of a pre-existing collective bargaining agreement might inhibit the free transfer of capital. 406 U.S. at 287-88. See also *Howard Johnson Co. Inc. v. Detroit Local Exec. Bd.*, 417 U.S. 249 (1974), and the reference to this case at 258 n.3. In short, the NMU could not have required Commerce or any other employer to have bargained collectively concerning a proposal to restrict the class of purchasers to whom employers might sell their assets, and as seen by the actual facts, the Union never did require such bargaining.

Bona Fide Bargaining

There was never any "bona fide" bargaining between the NMU and Commerce (or any independent employer) concerning restraint-on-transfer. As Judge Griesa has already found: In July, Commerce signed an NMU contract containing the economic terms. Thereafter, the restraint-on-transfer clause was agreed to "orally" by Mr. Silver, the MSC/TSC representative. The clause was then inserted in the printed contract mailed to all employers, including Commerce, 411 F. Supp at 1233-34. As of February of 1971, none of the independents had been requested to agree to the clause (980-81a).⁴ In February, when Commerce first realized the practical impact of this clause, it sought to bargain collectively with the Union concerning relief from it. The NMU flatly refused (479-80a). Having locked Commerce into an outrageously one-sided restriction respecting transfer of its vessels, the NMU saw no need to bargain away the "rights" which it had arrogated to itself. It is impossible to conceive that any federal policy favoring "collective bargaining" could excuse from antitrust liability the implementation of a restraint which was never bargained for or about.

The majority opinion also indicates that the NMU conduct may be "sheltered" because the restraint-on-transfer clause was included in an otherwise lawful collective-bargaining agreement and that this issue is not necessarily determined by the prior holding that the clause violated §8(e), "although it lends support to appellants position" (2943). Commerce would concede that not every union agreement which fails to meet the "work-preservation" standards of *National Woodwork Mfrs. Association v. NLRB*, 386 U.S. 612 (1967) will necessarily result in union liability under the antitrust laws, *id.* at 631, n. 19. But here again, the majority misconstrues the holding in *Connell*. To the same extent it was true that Local 100 had no interest in representing *Connell's* employees, the NMU had no interest in representing Vantage's employees. If the object of the clause was really to extend jurisdiction, rather than to restrain transfers, the Union would surely have consented to Judge Wyatt's original order submitting the controversy to the NLRB for its determination of the jurisdictional issue (55a). The "undertaking" Local 100 demanded of *Connell* is functionally indistinguishable from the "undertaking" the NMU demanded that Commerce secure from Vantage, and neither "undertaking" was either lawful or a part of a lawful collective bargaining relationship.

Finally, in remanding for "further findings as to anti-competitive effects" the majority opinion is silent as to the state of the record. But, Judge Lumbard's opinion specifies such effects already apparent from the record (2950). Is the District Court to conclude that the matters carefully itemized by Judge Lumbard are (i) not apparent; or (ii) insufficient as a matter of law? Either direction is bound to lead the District Court astray. Commerce believes that the clear and unequivocal holding in *Connell* requires, on any comparison of the two cases, an immediate finding of liability:

In *Connell*, the Supreme Court found that the agreements "indiscriminately excluded non-union subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions, but rather from more efficient operating methods." 421 U.S. at 623.

The agreements the NMU made with the MSC/TSC indiscriminately excluded non-union (and SIU) employers from a portion of the coastwise market, even if their competitive advantages were not derived from substandard wages and working conditions, but rather from more efficient operating methods.

In *Connell*, the multi-employer agreement included a "most favored nation" clause that "guaranteed that the Union would make no agreement that would give an unaffiliated contractor a competitive advantage over members of the association." 421 U.S. at 623.

"The method Local 100 chose also had the effect of sheltering existing employers from outside competition in that portion of the market covered by subcontracting agreements. . ." 421 U.S. at 624.

"The Union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers unrelated to the Union's legitimate goals of organizing workers and standardizing working conditions." 421 U.S. at 624.

"Here Local 100, by agreement with several contractors, made non-union subcontractors ineligible to compete for a portion of the

The NMU's agreement with MSC/TSC required that any purchaser of an NMU vessel accept "all of the terms and conditions" of the multi-employer contract, thus guaranteeing to the members of the Associations that the Union would make no agreement that would give a previously unaffiliated contractor a competitive advantage over members of the Associations.

The NMU agreement with MSC/TSC applied only to sales and transfers in the coastwise market, thus having the effect of sheltering covered employers from outside competition in that portion of the market.

The NMU thus had complete control over transfers of vessels in the coastwise trade. The potential to abuse this power became a *fait accompli* when in March of 1977 the Union admittedly refused to consent to a transfer to Vantage despite the absence of any buyer able to continue an NMU crew because the vessel would "remain in competition with existing NMU companies and vessels that were still struggling . . ." (E117).

Here, the NMU, by agreement with MSC/TSC, made non-union and SIU-contracted employers ineligible to compete for the

available work. This kind of direct restraint on the business market has substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." 421 U.S. at 625.

purchase of vessels in the coastwise market and for a portion of the work available to operators of United States flag vessels. Application of the clause was in no way dependent on wages or working conditions.

Thus, as to every issue on the question of liability, this case is governed by *Connell*. The NMU has already had ample opportunity to prove any facts relating to the "reasonableness" of the restraint-on-transfer clause. It sought to show only that it had not conspired with the large shipping companies for the benefit of those companies. After six years of litigation, it has yet to plead or even suggest any "additional facts" which would excuse the Union's enforcement of the group boycott.⁵

For the foregoing reasons, petitioner asserts that remand to the District Court for further factual findings cannot possibly serve any effective judicial purpose and may be abused by the Union for delay or even a "new trial."

II.

The decision of the panel of this Court to the extent it affirms the dismissal of Commerce's "second" antitrust claim is erroneous and ought to be vacated or, in the alternative, clarified.

Commerce's amended counterclaims contain two distinct antitrust claims. The Fourth Amended Counterclaim (271-272a) is the *per se* claim of group boycott. The Fifth Amended Counterclaim (272-276a) adds to the prior claim principally allegations that the NMU acted together with the supervisory unions in securing the restraint-on-transfer provisions; and that the MSC/TSC employers were improperly induced to accept restraint-on-transfer by (a) coordinated demands of the supervisory unions; and (b) the relationship of restraint-on-transfer to simultaneously negotiated provisions for industry-wide pension funding, all of which, per force, required extra-unit

enforcement of the clause against non-members of the associations, such as Commerce and purchasers of NMU vessels. As such, the Fifth Amended Counterclaim properly stated a claim, and was proved and briefed to the District Court, under the standards of *Mine Workers v. Pennington*, 381 U.S. 657 (1967); *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971); and *Riverton Coal Co. v. United Mine Workers*, 453 F.2d 1035 (6th Cir. 1972).

The District Court, however, treated the Fifth Amended Counterclaim as asserting a claim that the clause "was the result of a combination or conspiracy between the NMU and large shipping companies to enhance their competitive and financial position at the expense of smaller companies such as Commerce," 411 F. Supp. at 1229, and misapplied the standards of *Allen Bradley & Co. v. Local 3 Intl. Bd. of Electrical Workers*, 325 U.S. 797 (1945) to dismiss it.

Commerce does not accept Judge Griesa's characterization of the Fifth Amended Counterclaim as a conspiracy claim, and further asserts that the District Court erred in drawing broad conclusions of fact while omitting to discuss the details.⁶ With a lengthy factual recitation, Commerce urged the Panel to correct Judge Griesa's erroneous conclusions, even if necessary to do so by proceeding on the "clearly erroneous" standard. See *United States v. United States Gypsum*, 333 U.S. 364, 394-5 (1948). The Panel rejected this approach, apparently because the Union had not addressed the antitrust issues (2944, n.9).

But, the majority decision, if permitted to stand unaltered, literally says:

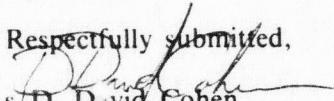
"We therefore remand to the district court for consideration of the merits of the *first* antitrust claim." (2944-45; emphasis added.)

If this case must be remanded, the District Court's prior error in its analysis of Commerce's Fifth Amended Counterclaim should first be vacated or clarified, lest it lead to further error below in view of the Court's direction that appellants be allowed to press their group boycott claim on alternative legal theories.

CONCLUSION

In early 1971, by virtue of a contractual clause it had never signed or in any way approved, Commerce was caught unawares in the middle of a bitter maritime industry struggle from which it desperately tried to escape. Commerce offered to drop all antitrust and labor claims against the NMU if only the Union would permit it, *in the absence of any NMU-contracted buyer*, to tender the Vessel to Vantage. The Union refused because, according to Shannon Wall, President of the NMU, allowing the Vessel to be transferred to Vantage would mean that the Vessel thereby remain "in competition with existing NMU companies and vessels that were still struggling. . ." (E117). After Mr. Wall's admissions, what is left to be determined in this case that can best be left to a trial judge who will have available only the cold record of a proceeding held two years and four months ago? Finally, what assurance will the appellants have that after remand any assets will remain in the Union's treasury for the payment of the monetary damages which were inflicted upon them? Is the Court so insensitive to the practical realities that it would order the damaged parties to continue this litigation purely as an academic exercise?

Wherefore, Commerce requests that the case be remanded to the District Court solely with instructions as to the law to be applied in assessing damages against the NMU.

Respectfully submitted,

s/ D. David Cohen
Attorney for Defendant-
Counterclaimant-Appellant

FOOTNOTES

2. The majority upheld the so-called injunction bond limitation rule which limited Commerce's recovery on the wrongful injunction claim to the amount of the bond, as to which Commerce intends to file a petition for certiorari review.

3. The first such agreement was made by eight employers as a midterm modification to the collective bargaining agreement of the Marine Engineers Beneficial Association (E22). The extension of the clause to the remainder of the industry thereafter became "a foregone conclusion" (745a) and was, in fact, included in the printed version of the NMU's 1969 agreement "without significant discussion" (2950). Although the proofs at trial showed that every other clause of the NMU's 1969 agreements had been carefully signed by each employer, the restraint-on-transfer clause was never shown to any independent employer; and neither the associations nor any independent ever agreed to it in writing, although the clause was included in a printed version of the contract first distributed in February of 1970, some eight months after its purported effective date. Judge Griesa found that the Union's failure to get the clause "signed" was due to "oversight," 411 F. Supp. at 1234, a finding which Commerce contends is "grossly erroneous." See footnote 6 *infra*.

4. Commerce had never authorized the committee to negotiate for it; had never been a MSC/TSC member, and had never participated in or ratified their work. 457 F.2d at 1135.

5. It is important that Commerce urged the District Court to make specific findings of fact, "even if contrary" to those proposed by Commerce "to clarify the record for the Court of Appeals" (1458a) and the District Court rejected that request and substituted instead the broad brush approach to the facts urged upon it by the Union.

6. For example, Judge Griesa found that "the restraint-on-transfer clause was a demand by the unions on all the companies, large and small" (1413a). As to the NMU, this is palpably erroneous. No such demand or request was ever communicated to Commerce or any other independent. The provisions were simply imposed on them by agreement with the MSC/TSC employers. Ample proof of that is in the record: NMU counsel first stated that the "blue book," incorporating restraint-on-transfer, had been transmitted to the independents by writings requesting signature, and that blue books had been signed by a number of companies (415-21a). Counsel then "stalled" the Court, obviously hoping to avoid production (455-47a; 487a). Switching tactics, the NMU then contended that the initial writings were destroyed after the blue book was printed up (532a). Judge Griesa found it incredible that the Union did not categorically know whether or not there was a memorandum of understanding executed covering Article 1, Section 2 (532a). The Union finally admitted that "nobody was asked to sign this agreement" (978-81a). Despite this record, Judge Griesa credited Spector's belated testimony that the Union's failure to get the independents to sign off on restraint-on-transfer was due to "oversight." If not corrected, or at least addressed, this "clearly erroneous" finding will simply form the predicate for further errors on remand.

7. Burdened by the damages, losses, and substantial legal expenses arising out of this controversy, on January 31, 1977, Vantage filed a petition in bankruptcy (77-B-0203). In a real way, jobs of American seamen may once again be at stake.

APPENDIX

SLIP OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 179-80—September Term, 1976.

(Argued January 19, 1977 Decided April 15, 1977.)

Docket Nos. 76-7217, 7223

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

—and—

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORPORATION,

Plaintiff-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

B e f o r e :

LUMBARD, FEINBERG, *Circuit Judges*, and
COFFRIN, *District Judge*.*

Appeal from judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing complaint alleging violations of federal antitrust and labor laws, and limiting recovery for wrongful injunction to amount posted for injunction bond.

Affirmed in part and reversed in part.

D. DAVID COHEN, Great Neck, N.Y., *for Defendant-Counterclaimant-Appellant*.

MARTIN C. SEHAM, New York, N.Y. (Surrey, Karasik, Morse and Seham; Fred C. Klein, David F. Devine, on the brief), *for Intervening Defendant-Appellant Vantage Steamship Corporation*.

CHARLES SOVEL, New York, N.Y. (Phillips & Cappiello), *for Plaintiff-Appellee*.

FEINBERG, *Circuit Judge*:

Over six years ago, appellant Commerce Tankers Corporation for pressing economic reasons attempted to sell its last remaining vessel to Vantage Steamship Corp., also appellant here. Appellee National Maritime Union (NMU), which represented the seamen on the vessel, objected to the sale because Commerce had not obtained a commitment from Vantage to continue the NMU as bargaining repre-

* Of the United States District Court for the District of Vermont, sitting by designation.

sentative, in accordance with a provision of NMU's collective bargaining agreement with Commerce. This began a flurry of litigation over a period of several years among Commerce, Vantage, NMU and the National Labor Relations Board (NLRB), in combinations and permutations set forth below.

At first NMU blocked the sale, obtaining an arbitration award and an injunction in the United States District Court for the Southern District of New York. *National Maritime Union v. Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971). That injunction, however, was reversed after the Regional Director of the NLRB, on an application under § 10(1) of the National Labor Relations Act, alleged that there was "reasonable cause to believe" that the clause invoked by the NMU violated section 8(e) of the National Labor Relations Act, see *McLeod v. National Maritime Union*, 457 F.2d 1127 (2d Cir. 1972), a preliminary determination later confirmed by the Board and by this court in *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974). Commerce and Vantage claimed that they suffered damages of \$1,550,000 and \$2,230,000, respectively, due to NMU's conduct, which they alleged violated not only the National Labor Relations Act, but also the Sherman Act.¹ After a non-jury trial in the United States District Court for the Southern District of New York, Judge Thomas P. Griesa found that the proximate cause of any damage was the district court injunction against the sale. The judge therefore limited Commerce's recovery to the \$10,000 injunction bond posted by NMU in the litigation below and denied Vantage any relief whatever, since it was not covered by the bond. 411 F. Supp. at 1225. This appeal fol-

¹ Appellants also alleged, *inter alia*, violation of the New York antitrust law, wrongful injunction, and tortious interference with contract. Only the second of these claims is pressed here.

lowed. For reasons set forth below, we reverse and remand for further consideration of appellants' claim under the Sherman Act.

I

The background of this litigation is set forth in our two prior opinions cited above, and we will try not to repeat here anything but the essential facts. The contract clause in question, which is reproduced in the margin,² was contained in a multiemployer NMU collective bargaining agreement, to which Commerce was a party. The clause provided in substance that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser "a written undertaking" to abide by the NMU contract. In the fall of 1970, Commerce's parent, Vernitron Cor-

² Article I, section 2, which is entitled "Sale and Transfer of Vessels," provides:

(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

poration, decided for business reasons to go out of the shipping business. On December 23, 1970, Commerce contracted to sell the S.S. Barbara, an ocean-going tanker, to Vantage for a price of \$2,750,000, with delivery scheduled for February 28, 1971. The contract did not contain any provision regarding "the complement of employees" to be furnished by the NMU; nor did Commerce obtain from Vantage the undertaking with the NMU called for by paragraph (b) of the restraint-on-transfer clause. See note 2, supra. At the time, Vantage could not properly have given such an undertaking, since it was party to a conflicting agreement with the Seafarers International Union of North America (SIU), a rival maritime union. In January 1971, Vantage chartered the ship it had contracted to purchase to the Standard Oil Company of California (SoCal) for a period of one year, commencing on March 5, 1971.

At this point, furious activity ensued. The NMU demanded of Commerce and Vantage that Vantage accept the NMU as the bargaining agent of the unlicensed seamen employed aboard the ship. The SIU threatened to strike all Vantage vessels if it ceased using the SIU hiring hall to obtain its unlicensed seamen. Vantage threatened to sue Commerce if it did not deliver the S.S. Barbara in accordance with its contract. The NMU commenced and won a labor arbitration, at which the arbitrator did not consider the legality of the restraint-on-transfer clause; the award

ruled the sale of the vessel without compliance with the clause. The next day, NMU began an action against Commerce in the United States District Court for the Southern District of New York for confirmation of the award. A week later, Vantage intervened as a party defendant and also filed unfair labor practice charges with the NLRB against the NMU and Commerce. After some other skirmishing, Judge Frankel in early March 1971

granted a preliminary injunction against the sale unless the contested clause were observed. The arguments of Commerce and Vantage that the clause was illegal were given short shrift, *National Maritime Union v. Commerce Tankers Corporation*, supra, 325 F. Supp. at 364-65, and the court required NMU to post only a \$10,000 bond. Both Commerce and Vantage appealed.

At about this time, Vantage's charter with SoCal was cancelled due to "union problems." Shortly thereafter, Commerce advised the NMU that all efforts to obtain a United States flag purchaser had been unsuccessful and Commerce asked the NMU to drop its objection to the transfer, offering to drop its legal attack on the clause. The NMU refused, saying that it "would not gamble that the ship might go SIU."

In late May 1971, the Regional Director of the NLRB issued a complaint against the NMU and sought a § 10(1) injunction against enforcement of the restraint-on-transfer clause. The NLRB's motion was heard along with a motion by Commerce to vacate the earlier preliminary injunction against it, in view of the intervening NLRB complaint. In July 1971, Judge Croake denied both motions, but it appears that were it not for the jurisdictional problem posed by the earlier appeal of Commerce and Vantage, the judge would have vacated the injunction obtained by the NMU.³ The NLRB appealed from the order refusing a § 10(1) injunction.

By notice of motion dated July 21, 1971, Commerce moved in this court to vacate the NMU injunction against the sale of the vessel, or, in the alternative, to increase

3 *McLeod v. National Maritime Union*, 329 F. Supp. 151, 160 (S.D.N.Y. 1971). Judge Croake's original opinion vacated the preliminary injunction. The judge thereafter decided, however, that since the issue was the subject of a pending appeal, he should not, as a matter of discretion, express any opinion on the subject. The opinion was revised accordingly.

the bond to be posted by the NMU to \$2,750,000. Commerce advised the panel then sitting of the NLRB complaint and of various additional financial exigencies⁴ and argued strenuously that at least the NMU "should be obliged to post a bond to cover the full purchase price of the vessel so that Commerce . . . will not be left in a situation in which recovery against any of the other parties cannot be readily accomplished." The NMU's position was that a large bond was "singularly inappropriate . . . in view of the absence of any meaningful defense to the merits of the action [by the NMU against Commerce]." The panel denied Commerce's motion, but expedited the appeal. Thereafter, another panel reversed the rulings of the district court, vacating the NMU injunction and granting the NLRB a § 10(1) injunction. 457 F.2d 1127. Eventually, the NLRB completed the unfair labor practice proceeding and found that the NMU had violated § 8(e) of the Labor Act. The NLRB sought enforcement of its order, which we granted. 486 F.2d 907.

II

This background brings us to the litigation now before us. From the start, Commerce—later joined by Vantage—has claimed that the NMU's restraint-on-transfer clause was illegal and should not be enforced, and that the NMU was liable to it for damages. Commerce's damage claims were pressed in the form of counterclaims in the suit by NMU against it. Vantage brought its own action in October 1972 against the NMU and Commerce. In June 1973,

⁴ Thus, the affidavits in support of the motion pointed out that Commerce had been directed by an arbitration award that it had obtained against Vantage, see 486 F.2d at 910 and n.3, to sell the S.S. Barbara in order to minimize damages, that the only outstanding offer at the time was \$1,300,000 from a foreign flag operator, and that Vantage said it was still willing to buy the ship for \$2,750,000 if it had the "express right to operate SIU."

pursuant to a settlement agreement between Vantage, Commerce and Vernitron, the action was discontinued against Commerce and Vernitron. After our reversal of the injunction obtained by the NMU in its action, Commerce's counterclaims against the NMU in that suit and Vantage's action against the NMU were consolidated and tried without a jury before Judge Thomas P. Griesa. The trial lasted over two weeks; 15 witnesses testified and there were over 1500 pages of transcript.

Commerce and Vantage argued that the NMU was liable for damages on a number of theories. First, the NMU violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in two ways described by the district judge as follows: "(1) That the restraint on transfer clause involved a group boycott against certain potential purchasers of vessels and therefore constituted a *per se* violation; and (2) that the sale and transfer clause was the result of a combination or conspiracy between NMU and large shipping companies to enhance their competitive and financial position at the expense of smaller companies such as Commerce." 411 F. Supp. at 1229. Second, the NMU was liable under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, which by its terms incorporates section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), both of which are reproduced in the margin.⁵ Third, Com-

5 Section 187 reads:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

merce and Vantage relied on various other alleged bases of liability: The contract clause violated New York General Business Law, § 340, known as the Donnelly Anti-trust Act; the NMU wrongfully induced breach of the contract between Commercee and Vantage for the sale of the S.S. Barbara; and the NMU obtained a "wrongful injunction."

Judge Griesa decided all of these claims on the merits except the very first of the two federal antitrust claims. On the second antitrust claim, the judge held in a lengthy opinion that the evidence did not support the view that the restraint-on-transfer clause was the result of a "con-

Section 185(b)(4) reads:

(b) It shall be an unfair labor practice for a labor organization or its agents—

...
(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

The "subsection (e)" referred to above is the same section 8(e) which the NLRB and then this court found that the NMU had violated by the restraint-on-transfer clause. 486 F.2d 907.

spiracy between the NMU and large shipping companies to enhance their competitive . . . position at the expense of smaller companies . . ." The judge also ruled that even though the clause violated section 8(e) of the Labor Act, the NMU was not liable under 29 U.S.C. §§ 158(b)(4) and 187. The former section provides that it shall be an unfair labor practice for a labor union "to threaten, coerce, or restrain any person" with "an object" of "forcing or requiring any employer" to enter into a prohibited agreement or "forcing or requiring any person . . . to cease doing business . . ." with anyone else. The judge held that the NMU did not coerce Commerce into signing the agreement containing the restraint-on-transfer clause. Nor did the NMU coerce Commerce into maintaining the clause, since the NMU did not "strike or threaten to strike" to enforce the provision, but instead "went to arbitration and then to court, . . . [and] resort to a court for a judicial remedy is not coercion." 411 F. Supp. at 1238. Accordingly, the judge found that the NMU did not violate section 8(b)(4) of the Labor Act and therefore appellants could not recover under 29 U.S.C. § 187. With regard to the other asserted theories of liability, the judge held that the New York State antitrust law was inapplicable, on the authority of *Connell Construction Co. v. Plumbers and Steamfitters Union No. 100*, 421 U.S. 616, 635-37 (1975), that the NMU was not liable for wrongful inducement of breach of contract because "the proximate cause of the asserted injuries was the preliminary injunction, and the remedy of Commerce and Vantage is limited to the injunction bond," 411 F. Supp. at 1240, and that the NMU's liability for the "wrongful injunction" was limited to the \$10,000 bond posted for the benefit of Commerce only.⁶

6 Perhaps through oversight, the bond did not cover Vantage.

The only claim that the judge did not decide on the merits was that "the restraint-on-transfer clause was a group boycott against certain potential purchasers of vessels and therefore constituted a per se violation" of the Sherman Act. 411 F. Supp. at 1229. Judge Griesa recognized that this claim raised the preliminary issue whether the clause could be considered exempt from the antitrust laws after the Supreme Court decision in *Connell*, *supra*. But he decided that it was not necessary to reach that issue, because even if the clause were subject to the anti-trust laws and did violate them, the violation would not be "the proximate cause" of the injuries to Commerce and Vantage. The judge found instead that:

The proximate cause of the delay and final frustration of the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.

411 F. Supp. at 1239. Accordingly, the judge denied recovery "on any theory of antitrust violation." *Id.*

III

Judge Griesa cited no authority for the view that one who commits a per se violation of the Sherman Act can be insulated from liability by the injunction bond rule. That rule has its origin in early equity practice. The chancellor had limited authority to award damages directly, but had broad discretion to frame orders granting injunctions. See generally 1 J. Pomeroy's *Equity Jurisprudence* §§ 1-39, 237(e) (5th ed. 1941). The practice grew up of conditioning the grant of a preliminary injunction on a

plaintiff's agreement to post a bond to cover any damages that might result if it were later determined that plaintiff was not entitled to an injunction. See *Russell v. Farley*, 105 U.S. 433 (1881). The plaintiff, in effect, consented to liability up to the amount of the bond, as the price for it. Otherwise, plaintiff could be found liable for damages only on the theory of malicious prosecution, an action at law. See *Benz v. Compania Naviera Hildago*, 205 F.2d 945, 948 (9th Cir. 1953); 7 Moore's Federal Practice ¶ 65.10[1] at 65.98-99.

We recognize the authority of the injunction bond rule, and we have relied on it ourselves. E.g., *In re Spencer Kellogg & Sons*, 52 F.2d 129, 134-35 (2d Cir. 1931). But we do not think it applies to the antitrust claim pressed on the unique facts of this case. The purpose of the injunction bond rule is to provide protection to a defendant who is under injunction in an equity action, but who ultimately prevails on the merits. The rule, however, does not apply to this action at law for damages arising out of a per se antitrust violation. Had Commerce and Vantage brought their actions before the NMU's suit to enforce the restraint-on-transfer clause, their recovery would not have been barred by the intervening wrongful injunction, nor would their damages have been limited to the amount of the bond. We do not believe that their rights are altered because Commerce asserted its antitrust claims as counterclaims in the suit against it, or because Vantage intervened as a defendant in that action and brought its own action for damages after the NMU obtained its wrongful injunction.

The NMU argues that it cannot be held liable even if its restraint-on-transfer clause violated the antitrust laws because the district court injunction was a "superseding cause" and because good faith resort to the courts cannot be a basis for liability, citing, e.g., *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127

(1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). But those cases do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it. Indeed, the language in them indicates to the contrary.⁷

It appears that the district judge was led astray by applying the wrong standard for proof of damages in antitrust cases. Proximate cause for an antitrust violation is based on the statutory requirement that the injuries occur "by reason of" the antitrust violation. 15 U.S.C. § 15. We have described the test as

a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of the damage.

Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (citations omitted). By this standard, the execution of the disputed clause and the NMU's determined efforts to enforce it were the proximate cause of injury to appellants, and the notion of superseding cause urged on us by the NMU on appeal is simply inapplicable. Similarly, we have emphasized that the right to recovery under the antitrust laws is given to those in the "target area" of the violation. *SCM Corp. v. Radio Corporation of America*, 407 F.2d 166, 171 (2d Cir.),

7 Petitioners, of course, have the right of access to the agencies and courts to be heard That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. . . .

404 U.S. at 513-14. (Footnote omitted). See also 365 U.S. at 136-37.

cert. denied, 395 U.S. 943 (1969); *Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972). Vantage, and other potential buyers of vessels, were the targets of the restraint-on-transfer clause.

Finally, we regard the district judge's emphasis on "the long delay of Commerce and Vantage in seeking an appellate remedy" as misplaced. Even if there had been an inexcusable delay, that would be irrelevant to NMU's antitrust liability under the tests referred to above. But even more important, there was no undue delay in seeking appellate relief in this unusual case. After the district court enjoined the sale in March 1971 and an appeal was taken to this court in early April, Commerce and Vantage frantically sought an immediate remedy at the NLRB by pressing the § 8(e) unfair labor practice charge. This was the most effective way of demonstrating that the district court injunction had been improper, and this course proved to be successful. Moreover, as soon as the NLRB issued its complaint on May 24, 1971, Commerce sought to vacate the injunction first in the district court and then in this court, and argued, in the alternative, for an increase in the NMU's bond. Under the circumstances, appellants followed a sensible course, and the NMU's efforts, successful at the time, to keep the injunction in force and the bond at an inadequate figure, strengthen rather than weaken, appellants' equitable position now.

We thus conclude that the district judge committed error in holding that no damages (above the \$10,000 bond) could be proved on the claim of a group boycott antitrust violation and in failing to rule on the substance of that claim. The obvious remedy for that error is to remand the case to the district court for it to consider appellant's first antitrust claim on the merits. Appellants, however, ask us to bypass that procedure and to hold that the re-

straint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell*, supra, and that the agreement constitutes a group boycott and is illegal per se under section 1 of the Sherman Act. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Both these assertions raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of the conflicting policies reflected in these laws has aptly been called "a troublesome and unruly issue." See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965). *Connell* indicates that a "nonstatutory" exemption from the antitrust laws in this case, see 421 U.S. at 622, turns upon whether the restraint-on-transfer clause was a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working condition," id. at 625, and whether the inclusion of the clause in "a lawful collective-bargaining agreement" shelters the NMU because of the "federal policy favoring collective bargaining." Id. at 626. See generally St. Antoine, *Connell*: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976); Note, Supreme Court Term—1974, 89 Harv. L. Rev. 234 (1975). And we do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to appellants' position. And even if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity.⁸ See *Mackey v. National Football League*, 543 F.2d

8

This brings us to the question of antitrust liability when union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-

606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977); see generally McCormick, Group Boycotts—Per Se or Not Per Se, That Is the Question, 7 Seton Hall L. Rev. 703 (1976) (on the complexity of the per se approach to group boycotts in general). It would, however, be inappropriate for us to decide these issues now without further findings from the district court and briefs on the questions from both parties.⁹ See *Connell*, supra, 421 U.S. at 637. At this point, we are without detailed findings from the district court on the anti-competitive effects of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause.¹⁰ We therefore remand to the dis-

exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea [Meat Cutters v. Jewel Tea Co., Inc.]*, 381 U.S. 676 (1965).] satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-40 (1971). Cf. *Jacobi v. Bache & Co., Inc.*, 520 F.2d 1231, 1238-39 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976).

9 On appeal, the NMU's brief did not discuss the antitrust claim at issue here, presumably because the district court did not reach it. Also, in their complaint and their briefs in this court, Commerce and Vantage have argued that the alleged group boycott was illegal *per se*. If, on remand, the district court determines that the rule of reason theory should apply, appellants should be allowed to press their claim of a group boycott antitrust violation under that theory.

10 We realize that the district court has already determined that the restraint-on-transfer clause was not the result of a conspiracy between the NMU and the large shipping companies to enhance their competitive position. Our remand on the issue of an illegal group boycott does not disturb that finding, but by the same token, the finding does not foreclose full examination of appellants' group boycott claim. We note that in *Connell*, "[t]here was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multi-employer bargaining unit . . ." 421 U.S. at 625 n.2. The Court none-

trict court for consideration of the merits of the first anti-trust claim.

IV

We turn now to the district court's dismissal of appellants' claim under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, see note 5, *supra*, and its limitation of NMU's liability for wrongful injunction to the amount of the injunction bond. With respect to the claim under § 303, we agree with the judge's determination that "resort to the courts" is not a threat, coercion or restraint under § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii). See *Retail Clerks Local 770* (Hughes Market, Inc.), 218 N.L.R.B. No. 84 (1975); cf. *Local Union No. 48 v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Similarly, the judge correctly limited Commerce's recovery for wrongful injunction to the \$10,000 injunction bond posted by NMU. See *Associated General Contractors v. Illinois Conference of Teamsters*, 486 F.2d 972, 974-75 (7th Cir. 1973); *International Ladies Garment Workers Union v. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir.), cert. denied, 325 U.S. 852 (1945); but see *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3d Cir.), cert. denied, 408 U.S. 923 (1972).

Accordingly, we affirm the court's dismissal of appellants' claims under § 303 of the Labor Management Relations Act and its limitation on the recovery for wrongful injunction, but reverse its dismissal of appellants' claim of a group boycott in violation of section 1 of the Sherman Act and remand for further consideration.

theless considered the multiemployer bargaining agreement as "relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market." *Id.* at 623. The same considerations apply in this case. Although the district court found no conspiracy between the NMU and the large shipping companies to injure the smaller companies, it must still evaluate the agreement between the NMU and the shipping companies for its effect on the market.

LUMBARD, *Circuit Judge* (concurring in part and dissenting in part):

I agree with my brothers that any limitation of recovery under the injunction bond rule does not bar full recovery for violation of the antitrust laws.¹ But I disagree with my brothers' failure to find that there has been a violation of the antitrust laws since the record made in the court below furnishes ample basis for such a determination. In my view, it remains only for the district court to assess the damages and enter judgment.

Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 634 (1975) squarely rejected the argument that § 303 of the LMRA provided the exclusive employer remedy for violations of the "hot cargo" prohibition of § 8(e) of the National Labor Relations Act ("NLRA"), 28 U.S.C. § 158(e). In determining whether to apply labor's nonstatutory exemption, the Court observed that "labor policy requires tolerance for lessening of business competition based on differences in wages and working conditions[.]" 421 U.S. at 622, but an agreement between a union and a nonlabor party which restrains competition in any other manner is not immune, 421 U.S. at 622-23; see *Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 806-11 (1945). In applying these standards to the facts before it, the *Connell* Court analyzed

¹ It seems to me there is considerable doubt of the continued validity of the limitation of recovery for wrongful injunction to the amount of the bond. See Metzger & Friedlander, *The Preliminary Injunction: Injury Without Remedy?* 29 Bus. Law. 913 (1974); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333 (1959); and Note, *Recovery of Damages on Injunction Bonds*, 32 Colum. L. Rev. 869 (1932). However, as appropriate recovery should be available for violations of the antitrust laws, no purpose would be served by further examination of that question.

the agreement in issue in terms of § 8(e) of the NLRA. Although the union argued that the agreement was saved by reason of the construction industry proviso to § 8(e), the Court disagreed and found it to be an illegal secondary boycott.

Once the Court reached the § 8(e) issue it deemed it unnecessary to engage in further scrutiny but concluded that the union was not immunized from antitrust liability. 421 U.S. at 634-35. I believe that inasmuch as the National Labor Relations Board ("NLRB"), 196 NLRB No. 165 (1972), and this court, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974), have adjudicated the NMU restraint-on-transfer clause and efforts at its enforcement to be a violation of § 8(e), there is no need for us or for the district court to re-examine this record. See *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 483 F.2d 1154, 1179 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (dissenting opinion of Circuit Judge Clark).

Implicit in our prior decision enforcing the Board's order was an acceptance of its finding that the restraint-on-transfer clause prevented Commerce from selling the S.S. Barbara to Vantage, 486 F.2d at 911.² We also ruled that the *National Woodwork* standards were met since the clause was not "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," 486 F.2d 912, quoting *National Woodwork Mfgs Ass'n v. NLRB*, 386 U.S. 612, 645 (1967). These two conclusions are sufficient to meet the *Connell* standard that the clause have "a potential for restraining competition in the business market in ways that would not follow naturally from

2 The district court's opinion arrives at the same basic finding but for its legal conclusion which we today reject that the NMU's resort to arbitration and the ensuing injunction were nonactionable superseding causes. 411 F. Supp. at 1239.

elimination of competition over wages and working conditions." 416 U.S. at 635.³

The majority suggests that inclusion of the clause in "a lawful collective-bargaining agreement" might save it from antitrust scrutiny, — F.2d at —, slip op. at —, quoting *Connell*, supra at 626. But that argument has no application to the facts before us since we have already ruled that portion of the collective-bargaining agreement to be unlawful as violative of § 8(e).

The record before us requires a finding of liability on either a per se or rule-of-reason analysis of the NMU's actions.⁴ Under the per se approach a well-meaning purpose will not insulate a group boycott from liability, see *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), and its anticompetitive effect will be presumed, see *Northern Pacific Railway v. United States*,

3 This view is fully consistent with the thoughts of Professor Handler whose comments are favorably cited by the majority:

To me the test should be this: Whatever is required or expressly authorized under existing labor legislation should be exempt from the antitrust laws. And whatever is mandatory should be determined in the light of our national labor policy, which should override any countervailing antitrust considerations.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 238 (1971).

Perhaps a finding of no exemption entails a preliminary appraisal of the nature and merits of the underlying antitrust claim, but it does not necessarily follow that the labor organization will be found liable on that claim. "Exemption and liability are not co-extensive concepts." *Id.* at 237. The removal of the shroud of immunity simply means that the union must answer to the charge of violating the antitrust laws.

4 In a post *Connell* decision, the Eighth Circuit has found the per se approach to be inapplicable to a group boycott arising out of a labor agreement. See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977). A rule of reason inquiry in the context of a labor boycott might well be an appropriate means to balance the goals of the antitrust laws with the positive values of collective-bargaining.

356 U.S. 1, 5 (1958).⁵ Under the balancing approach of the rule of reason, examination of the facts of this case indicates that the anticompetitive effects of this particular agreement outweigh any legitimate collective bargaining concerns.

Judge Griesa's 58 page opinion carefully traced the bargaining practices in the shipping industry and found that the restraint-on-transfer clause had its genesis in complaints made by Joseph Curran, president of the NMU, in a January 22, 1968 letter to Edward Silver concerning the loss of NMU-represented vessels through sale and transfer. Silver, who testified at trial, was the lawyer and chief negotiator for the two major shipping owners associations, the Tankers Service Committee ("TSC") and the Maritime Service Committee ("MSC"). The restraint-on-transfer clause was first successfully negotiated into a collective-bargaining agreement by the Maritime Engineers Beneficial Association ("MEBA"), a non-competing union, in a May, 1968 amendment to its contract with MSC. Judge Griesa found this version of the restraint-on-transfer clause to be the model for the NMU clause. The district judge found the purpose of the clause to have been memorialized in the following portion of a June 25, 1969 letter from J. M. Calhoon, president of MEBA to Silver:

The original and continuing purpose of said Memorandum is: To preserve the jobs and job rights of the Company's engineers covered by our collective bargaining agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such engineers under said Agreement.

⁵ For a recent and thorough review of this subject see McCormick, Group Boycotts—Per Se or Not Per Se, That is the Question, 7 Seton Hall L. Rev. 703 (1976).

411 F. Supp. 1224, 1233 (S.D.N.Y. 1976). The clause was subsequently adopted without significant discussion in the NMU's 1969 collective-bargaining agreement.

Allen Bradley Co., *supra* at 798, forecloses any argument that a labor agreement is not unreasonable simply because its general purpose is "to get and hold jobs for [the union members] at good wages and under high working standards." As we noted in our prior decision, the NMU's interest in job preservation was not directed at the crew members of the S.S. Barbara since it is the union's practice to strip a ship of its crew when it is sold and to have it remain from the hiring halls. 486 F.2d at 914.

The anticompetitive effect of the restraint-on-transfer clause is also apparent from the record before us. Its most immediate impact was to thwart the sale of the S.S. Barbara to Vantage, cause the cancellation of the lucrative SoCal charter, and virtually force the sale of the vessel for scrap. Beyond that, the clause prohibits shipowners from selling their vessels to United States Flag operators unless the prospective buyer agrees to enter into an NMU collective-bargaining agreement. Owners are effectively prevented from selling to a potential buyer whose employees are presently represented by the NMU's rival, the Seafarer's International Union ("SIU"). Sales are, therefore, limited to foreign flag operators, non-SIU operators, or those who would buy for scrap value. Mergers between small NMU represented owners and small SIU represented owners are foreclosed. By encouraging sales to foreign flag owners, the clause lessens competition among the American owners.

In summary, whether the appropriate inquiry is under a rule of reason or the per se measure, the record requires a finding that the Union must be held responsible for violation of the antitrust law.

I would hold that the NMU has violated § 1 of the Sherman Act, 15 U.S.C. § 1, and remand to the district court solely for determination of damages.

COURT OF APPEALS
SECOND CIRCUIT

COMMERCE TANKERS CORPORATION,
Defendant-Counterclaimant-Appellant
VANTAGE STEAMSHIP CORP..
Intervening Defendant-Zppellant
- against -

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Plaintiff-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Reuben A. Shearer being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030
That on the 13th day of May, 1977 at 1. 500 Fifth Avenue; N.Y., N.Y.
2. 346 West 17th St: N.Y., N.Y.

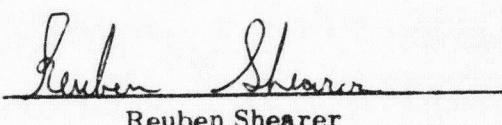
deponent served the annexed

Petition

upon
1. Surrey Karasik Morse & Seham
2. Philips & Cappiello, Esqs.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 13th
day of May, 1977



Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979